80-849

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

October Term , 1980

No_____

Jefferson Trucking Company, Petitioner

against

Chauffeurs, Teamsters, Warehousemen, and Helpers
Local Union No. 135, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHICH LAW APPLIES IN ACTIONS UNDER 29 U.S.C. §141 ET SEQ. THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (LMRA), THE INDIANA ARBITRATION ACT, OR THE UNITED STATE ARBITRATION OF 1925 (USAA), 9 U.S.C. § 1 ET SEQ. IF EITHER.

II.

WHEN THE CHOICE IS MADE BY A FEDERAL DISTRICT COURT TO ADOPT THE STATE STATUTE OF LIMITATION IN AN ACTION TO ENFORCE AN AWARD UNDER LMRA PROCEEDINGS CAN THE CONSIDERATION OF THAT COURT IGNORE THE SUBSIDIARY MATTERS OF STATE LAW ON CORRESPONDING COUNTER-CLAIMS AND TOLLING? OR IF THE LOWER COURT WAS REQUIRED TO USE THE STATUTE OF LIMITATION OF THE UNITED STATES ARTIBRATION ACT IS SUCH A COURT REQUIRED TO CONSIDER FEDERAL DECISIONAL LAW ON COUNTER CLAIMS AND TOLLING?

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PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Ceriorari be issued to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 28, 1980.

Decisions Below

The official citation of the decisions below are 473 F. Supp. 1255 (S.D. Ind. 1979) 628 F.2d 1023 (7th Cir. 1980) presented in the appendix.

Jurisdiction

The date of order from which relief is sought is August 28, 1980. No rehearings were sought. No extensions have been prayed for at anytime.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. 1254. The Courts below were presented the case on the jurisdictional basis of 28 U.S.C. §1337, based upon an action to enforce a labor contract under the Labor-Management Relations Act, 29 U.S.C. §185

PETITION FOR WRIT OF CERTIORARI

Outline of the Case

On October 18, 1977, an employee, Paul Nettleton, was involved in a severe accident while driving a truck of Appellant Jefferson, involving extensive property damage. On October 19, 1977, Nettleton was given written notice that he was discharged for the following reasons in writing with his representative present. (Appellee is the party representative for Paul Nettleton).

> "On October 18, 1977, at approximately 8:30 p.m. Mr. Nettleton was involved in an accident while driving units 992 and 568 loaded with paper. The accident is a major chargeable accident due to excessive speed conditions. Driver is discharged."

This Notice was given pursuant to Article XI of The Collective Bargaining Agreement and Paragraph 9 of the Uniform Rules and Regulations which are attached as Appendage B of the Agreement. Both the Agreement and the rules provide that the discharge must be written notice and that a copy of the Notice must be directed to the Local Union and Shop Steward. No further requirements regarding Notice of Discharge are contained in the Agreement.

Pursuant to Article X of the Collective Bargaining Agreement, Mr. Nettleton filed a grievance and the matter went through the first three steps of the grievance procedure without settlement prior to presentation to the Joint Committee. Through all three steps Mr. Nettleton maintained the position that the charge was of a major chargeable accident due to his negligence on the day in question was not true.

On November 7, 1977, Jefferson was provided with a copy of the agenda for the November 17, 1977 Joint Committee meeting. This agenda contained the following description of

the matter to be heard:

> "I protest letter of discharge dated 10/19/77. The charge is not true. I want to be reinstated with full seniority and paid for all time lost plus health, welfare and pension."

On November 17, 1977, the Appellant appeared at the Joint Committee meeting prepared to establish that Nettleton was in fact guilty of a major chargeable accident by testimony and documentary evidence. However, Appellant's repesentatives were not even permitted to present evidence because they had "failed to cite the specific contract Article or Rule violation as well as the offense . . .". The Committee decided that as a result of this failure the employer was required to reinstate Plaintiff with full seniority and back pay. This decision was made in spite of the fact that there is no provision in the contract of Uniform Rules requiring the employer to cite the specific contract Article or Rule violation as well as the offense in order to discharge an employee.

Appellee initiated this action on April 6, 1978, by filing a Complaint to Enforce a Joint Committee Award entered on November 17, 1977. Federal jurisdiction for Appellee's Complaint was predicated on §301 of the Labor-Management Relations Act, 29 U.S.C. §185. Appellant responded to Appellee's Complaint with an Answer which included eight affirmative defenses to enforcement of the Award.

On May 26, 1978, Appellee moved to strike Appellant's Affirmative Defenses and moved for Summary Judgment on the ground that Appellant's failure to move to vacate, modify or correct the Award within ninety days of its entry precluded Appellant from defending against the Award under both Federal and State Law.

Appellant responded with a Brief in Opposition to Appellee's Motions which rebutted Appellee's position under Federal and State law. In addition, Appellant filed a Motion seeking

leave to to move to vacate the Joint Committee Award pursuant to exisiting authority in favor of this proposition and also filed a proposed Motion to Vacate. Several response Briefs and reply Briefs followed prior to the Court's issuance of a Memorandum Opinion and Order on July 27, 1979. Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 vs. Jefferson Trucking Company, Inc., 473 F. Supp. 1255 (S.D. Indiana, 1979).

The Court's Opinion addressed one basic issue in deciding whether the three Motions should be granted or denied:

> ". . .whether Defendant, the unsuccessful party at arbitration, who did not move to vacate the disfavorable Award within ninety days as required under Indiana Law or within three months as required by Federal Statute, may now raise contentions, which he could have raised as grounds to vacate in such a Motion, as Affirmative Defenses in the instant suit to enforce the Award, which suit was filed after the three-month and ninety-day periods but within the time limits set for filing a suit to enforce or confirm an award." See Jefferson, supra, 473 F. Supp. at 1256-1257.

In the lower court Appellant presented affirmative defenses on eight grounds including (1) that the Joint Committee acted in an arbitrary and discriminatory manner by precluding Appellant from submitting any evidence on its behalf at the hearing, (2) that ther Joint Committee exceeded its authority by adding a term to the Agreement requiring citation to the contract Article and Rule violation number and (3) that enforcement of the Award would violate Federal Regulations regarding Medical qualifications of truck drivers because the driver in question had objective heart disease that could cause blackouts while driving and thereby explain a pattern of accidents that Nettleton was involved in that jeopardized not only company property and freight, but the property and lives

of others, in violation of Federal safety standards binding on the Driver and the Company.

I.

WHICH LAW APPLIES IN ACTIONS UNDER 29 U.S.C. §141 ET SEQ. THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (LMRA), THE INDIANA ARTIBRATION ACT OR THE UNITED STATES ARBITRATION OF 1925 (USAA), 9 U.S.C. §1 ET SEQ., IF EITHER.

The Lower Court's holding that the ninety (90) day limitation contained in the Indiana Arbitration Act, I.C. 34-4-2-13, precluded Defendant from defending against the Complaint to enforce the Arbitration Award after the passage of ninety (90) days gives rise to a number of issues. The initial issues are whether the Court should have applied the law under the Federal Arbitration Act rather than the Indiana Arbitration Act, and if so, whether the law under the Federal Act bars defenses after three months. Other issues concern whether the Lower Court erred in finding that a statute of limitations could run so as to bar a defense against Plaintiff's action regardless of which statute of limitations is appropriate. It is Defendant's position that when each of these issues is examined that it must be concluded that the lower court erred in holding the ninety (90) day limitation precluded Defendant from defending against Plaintiff's action to enforce the Joint Committee Award. Defendant will address each issue separately below.

A.

THE LOWER COURT ERRED BY APPLYING THE INDIANA ARBITRATION ACT AS OPPOSED TO THE FEDERAL ARBITRATION ACT.

It is well settled that if the Federal Arbitration Act is applicable then Federal Law, regarding all questions of interpretation, construction, validity, revocability and enforceability, controls to the exclusion of State Law. Coenen v. R.W. Presprich & Co., 453 F2d 1209 (2d Cir. 1972); Zell vs. Jacoby Bender Inc., 542 F2d 34 (7th Cir., 1976); Litton R.C.S., Inc. v Pennsylvania Turnpike Commission, 376 F. Supp. 579, 585587 (E.D. Pa., 1974); Aff'd 511 F2d 1394 (3rd Cir. 1975); American Airlines Inc. v Louisville and Jefferson County Air Board, 269 F2d 811 (6th Cir. 1959).

In Zell v Jacoby Bender, Inc., Supra, 542 F2d at 37, it was held that in order to determine whether the Federal Arbitration Act is applicable, the Court must first look to sections one and two of the Act, 9 U.S.C. § 1 and 2, to determine whether the contract is one "evidencing a transaction involving commerce." Given this holding, the crux of the issue in the instant case is whether the collective bargaining agreement is excluded by the following language contained in Section l of the Act:

> "...nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1

Appellant will not pretend to suggest that the meaning of this exclusion is clear. There is a definite division among the Circuits as to not only whether or not collective bargaining agreements are excluded by this Section but also, in those Circuits where it is held that collective bargaining agreements are not excluded, there is a division as to what kinds of collective bargaining agreements are excluded. For example, the First Circuit in Local 205, United Electrical Radio and Machine Workers of America (U.E.) vs. General Electric Company, 233 F2d 85, 100 (1st Cir., 1956); affirmed 353 US

547 (1957)[1] held that "the exclusion in Section One does not embrace collective bargaining agreements, as distinguished from individual "Contracts of Employment", and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act." The Third Circuit has held that it applies to all collective bargaining agreements except agreements of transportation workers. Tenny Engineering, Inc. vs. United Electrical, Etc., Workers, 207 F2d 450 (3rd Cir. 1952); but compare, Mason Dixon Lines, Inc. vs. Local 560, IBT, 443 F2d 807, (3rd Cir. 1971) indicating that after the Supreme Court's decision in Textile Workers Union vs. Lincoln Mills, 353 US 448 (1957) that this distinction may no longer be valid. Indeed, the Sixth Circuit has found Section One not to exclude collective bargaining agreements in the transportation industry in a decision involving an affiliate of the very union involved in this action. See Hoover Motor Express Co.,Inc. vs. Teamsters, Chauffeurs, Helpers and Taxi Cab Drivers, Local No. 327, 217 F2d 49, 5253 (6th Cir., 1954).

The decisions in the 7th Circuit regarding this issue are also in conflict. For example, recently in International Union of Operating Engineers, Local No. 139 vs. Carl A. Morse, Inc., 529 F2d 574, 581 (7th Cir. 1976), this Court upheld the application of the Federal Arbitration Act to a collective bargaining agreement in an industry it described as "mobile and tra sitory". Yet, in Pietro Scalzitti Co., vs. International Union of Operating Engineers, Local No. 150, 351 F2d 576 (7th Cir., 1965) this Circuit indicated that it was adopting the Third Circuit view that the exclusion in Section One covered

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1. The Supreme Court did not reach this issue in its affirmance. Instead it affirmed solely on the ground that Federal substantive law under §301(a) furnished the right to enforce an agreement to arbitrate. General Electric Co. v Local 205, 353 US 547, 548 (1957).

collective bargaining agreements in the transportation industry. However, it should be noted that the Court in Scalzitti, Supra, was actually broadening the scope of the coverage of the Federal Arbitration Act to collective bargaining agreements "in accord with the modern trend," "the intent of Congress" and the policy in favor of arbitration advanced in Lincoln Mills, Supra, 351 F2d at 577-578.

Given the law above and the modern trend to apply the Federal Arbitration Act to all collective bargaining agreements, including those in "mobile" industries Operating Engineers vs. Carl A. Morse, Inc., Supra, 529 F2d at 581, Defendant suggests that the First and Sixth Circuits' construction of the exclusionary provision in 9 USC §1 as applying only to individual contracts of employment as opposed to collective bargaining agreements is the interpretation most consistent with present authority in this Circuit and in others[2]. Therefore, this Court should find the Lower Court's application of the Indiana Arbitration Act as opposed to the Federal Arbitration Act erroneous.

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2. Even Plaintiff appears to agree with the applicability of the Federal Act since it argued that the time limitations in 9 USC §12 barred Defendant's defense after three months. (16a ¶1).

QUESTION PRESENTED

II

WHEN THE CHOICE IS MADE BY A FEDERAL COURT TO ADOPT THE STATE STATUTE OF LIMITATION IN AN ACTION TO ENFORCE AN AWARD UNDER LMRA PROCEEDINGS, CAN THE CONSIDERATION OF THAT COURT IGNORE THE SUBSIDIARY MATTERS OF STATE LAW ON CORRESPONDING COUNTER-CLAIMS AND TOLLING? OR IF THE LOWER COURT WAS REQUIRED TO USE THE STATUTE OF LIMITATION OF THE UNITED STATES ARBITRATION ACT IS SUCH A COURT REQUIRED TO CONSIDER FEDERAL DECISIONAL LAW ON COUNTER CLAIMS AND TOLLING?

THE LOWER COURT ERRED BY HOLDING THAT THE STATUTE OF LIMITATIONS RAN AGAINST DEFENDANT'S DEFENSES TO PLAINTIFF'S COMPLAINT TO CONFIRM THE AWARD.

Regardless of whether the limitations contained in the Indiana Act or the Federal Act are applicable, it is Defendant's contention that the Lower Court's ruling that these time limitations bar the assertion of a defense to a Complaint to enforce an Award is clearly erroneous. Appellant makes this contention regardless of the applicability of Indiana's counter-claim tolling provision.

The Lower Court's holding that the ninety day statute of limitations bars not only affirmative actions against the Arbitration Award but also defenses to confirmation of the Arbitration Award is irreconcilable with the well settled principle under Federal Law that limitations do not normally run against a defense.

In United States vs. Western Pacific R. Co., 352 US 59, (1956)

the United States Supreme Court addressed an issue quite analgous to the present case. In Western-Pacific, Supra, the Court was faced with a procedural anomally quite similar to the instant case, in that, in a dispute regarding tariffs, the United States could be sued for overcharges for six years while it had only two years to sue for undercharges. Western-Pacific R. Co., Supra 352 US at 70-71. The lower Court had ruled that the United States failure to bring suit for undercharges against the company within two years after the charges were made precluded the Government from defending against the company's claim that it had been overcharged since that suit was brought after the two-year limitation on the Government's right to sue for an undercharge but within the six year limitation on the company's right to sue. In reversing the lower Court's holding, the Court noted that the concept of a limitation on actions barring the right to defend against suit was totally alien to the very purpose of a statute of limitations:

> "the basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale." 352 U.S. at 72, 77 S. Ct. at 169.

The very same principle was recognized as applicable under Indiana Law in Burton v Martin Oil Service, Inc., 295 F2d 679 (7th Cir., 1961). In Burton, the Plaintiff acquired title to land through a tax sale and sued Defendant for possession. Pursuant to Indiana law, Defendant was required to contest the validity of the tax sale by bringing an action within one year but failed to do so. The time limitation on Plaintiff's right to sue was greater than one year. However, Defendant defended on the ground that the tax sale was invalid. Plaintiff moved for Summary Judgment, arguing that the statute of limitations barring Defendant's right to initiate an action to contest the validity of the sale also barred the Defendant's right to defend on the ground that the sale was invalid. The Trial Court overruled Plaintiff's Motion and she appealed contending that the statute of limitations "would be rendered negatory" if it did not bar an affirmative defense which could have been used as a ground to invalidate the award. Burton, supra, 295 F2d at 680-681. However, this Copurt rejected Plaintiff's argument and affirmed the District Court holding that it was clear under Indiana decisional law that "actions are barred but defenses are not." Burton, supra, 295 F2d at 681.

A similar result was reached in Luckenbach v United States, 312 F2d 545 (2d Cir. 1963). The Plaintiff in Luckenbach sought a declaration of nonliability against the Government. The Government argued that the Plaintiff's right for declaratory relief was barred by the Statute of limitations. (The Government's right to sue had not been barred). However, the Court rejected this argument finding that the Plaintiff's suit was in the nature of a defense, since he only sought non-liability and pointed out that under Federal law such defenses are not time barred. Luckenbach, supra, 312 F2d at 549-550.

The proposition to be extracted from the cases above is that if claims accruing to opposing parties arise out of the same transaction and separate limitations of different time periods govern the claims of each party then the party with the shorter

limitation period will be permitted to defend against an action initiated by the party with the longer limitation period even though the shorter limitation period may bar the right of the defending party to initiate their own action. The rationale for this proposition is that, once an action arising out of the transaction is initiated, the policy behind barring an issue that could have been raised in the time barred action is no longer present. That is, the limitation period is no longer useful to prevent stale litigation of this issue since it has been raised by the initiation of the action by the party with the longer limitation period.

The very circumstances covered by this principle are present in the instand action. Here, the losing party in an arbitration award has only three months, 9 USC § 12, or ninety (90) days, I.C. 34-4-2-13, to initiate litigation to vacate the Award. However, the winning party has at least one year to initiate litigation to enforce the Award. 9 U.S.C. §9, I.C. 34-4-2-12. If the losing party does not bring a Motion to Vacate the Award within three months the winning party still has the right to seek enforcement for nine(9) more months.If enforcement is sought within the nine month period then the purpose of the three month limitation of preventing stale litigation has been defeated since the same issues reappear once enforcement is sought. That is, the validity of the Award comes into issue regardless of whether the losing party moves to vacate because this jurisdiction and others have held that an Arbitration Award is not self executing and the Courts have no power to enforce an invalid Award. See Tamari v Conrad, 552 F2d 778, 781 (7th Cir., 1977) where it was held that an Arbitrator's Award is "not self executing" when holding an unsuccessful party at arbitration has an option to affirmatively defend against an Award as opposed to initiating an action to vacate. Accord: International Union of Operating Engineers, Local No. 450 v Midvalley Inc., 374 F. Supp. 1104 (D.C. Tex, 1972) and Lee v Olin Mathieson Chemical Corp., 271 F. Supp. 635 (D.C. Va 1967) where both Courts held the

Court has no power to enforce an invalid Award thereby implying the validity of the Award is always in issue. Under these circumstances, it makes little sence to hold that the losing party may not assert a defense against enforcement of the Award because once the action is brought the issues may be litigated. United States v Western-Pacific R. Co., supra, 352 US at 72.

In the instant case, the Court construed Appellant's defenses as a claim for affirmative relief and found that under such circmstances Appellant could not defend. Jefferson, supra, 473 F. Supp. at 1258. The Court relied on Nalley v McClements, 295 F Supp. 1357 (D. Del. 1969) for this construction of Appellant's defenses. The Court's reliance on Nalley v McClements, supra, is misplaced with respect to the issue of Appellant's right to defend. In Nalley, the Defendant sought leave to amend to file a Counterclaim after the statute had run. Nalley v McClements, supra, at 1359. The Court held that the Counterclaim was a request for affirmative relief and not a defense. Hence, while the Nalley case may have relevance to Appellant's attempt to move for leave to file a Motion to Vacate it is not applicable to the issue of whether Appellant could defend against enforcement. The cases applicable to Appellant's right to defend are United States v Western Pacific R. Co., supra, and Burton v Martin Oil Service Inc., supra, which speak to defenses and not Counterclaims.

Given the law above and the circumstances of the instant case, it is clear that the Lower Court erred in precluding the Appellant defending against enforcement of the Award.

THE LOWER COURT ERRED BY FAILING TO CONSTRUE THE INDIANA COUNTERCLAIM SAVING PROVISION AS PERMITTING RECOUPMENT BY WAY OF DEFENSE.

The Lower Court found that the Indiana Counterclaim Savings Provision would not permit Appellant to defendant against enforcement of the Award on the grounds that it was

procedural as opposed to substantive and a request for affirmative relief as opposed to recoupment. Jefferson, supra, 473 at 1258. While the Court's opinion finds some support in Nallye v McClements, supra, Appellant contends that this portion of the Court's holding is not dispositive in light of arguments A through C. Moreover, the Nalley case is distinguishable from the issue here since Appellant only seeks to use this provision in support of its right to defend and not in support of an affirmative claim.

Defendant suggests that the better view as to whether the Indiana Counterclaim tolling provision should give rise to the right to recoup against an action to enforce the Award is found in United States v. United States Casualty Company, 218 F. Supp. 653 (D. Dev., 1962). The Court in United States Casualty Co. held that the Delaware Rules of Civil Procedure regarding compulsory Counterclaims were based upon the defense of recoupment under Delaware Common Law and that both aspects of this Delaware Law gave rise to substantive Delaware Law permitting recoupment by Counterclaim in an action under Federal Law after the Statute of limitations had run. United States Casualty Co., supra, 218 F. Supp. at 657. The Court relied on the decision of Bull v United States, 295 US 247, 262, for the proposition that the Statute of limitations never bars recoupment.

The Court defined recoupment as "a defensive measure"... growing out of the same transaction or occurrence which was the basis of the opponent's claim and utilized for reduction or extinguishment of the opponent's claim." United States Casualty Co., supra, 218 F. Supp. at 657. This is exactly what Appellant seeks to do with its defense to enforcement. Appellant seeks nothing in excess of Plaintiff's claim that can be construed as a request for Affirmative Relief.

Indiana Trial Rule 13 J was initially based upon the Common Law Doctrine of Recoupment, Woodrull v Garner, 27 Ind. 4 (1866), later codified in Indiana Statute Anderson v Biggs, 118 App. 266 77 NE 2d 909 and finally incorporated into the

Trial Rules, Indiana Trial Rule 13 J. Hence, while the provision may now be placed within the Trial Rules, it has a definitive basis in the substantive law of Indiana. See, Fox v Barker, 14 Ind. 309 (1860). Given this history, under the rationale of United States v United States Casualty Co., supra, Defendant's defenses should be construed to be in the nature of recoupment and not barred by any statute of limitation.

UNDER THE FEDERAL ARBITRATION ACT DEFENSES WHICH COULD HAVE BEEN USED AS GROUNDS TO VACATE THE AWARD CAN BE RAISED TO PRECLUDE CONFIRMATION OF THE AWARD AFTER THE TIME LIMITATIONS IN SECTION TWELVE OF THE ACT HAVE ELAPSED.

If the applicability of the Federal Arbitration Act is established, it is settled that Federal Law is to be applied to the exclusion of State Law. Zell v Jacoby Bender, Inc., Supra. The question in this context is whether the three month limitation on motions to vacate an award precludes the assertion of a defense to enforcement of an award after the expiration of three months under Section Twelve (12) of the Federal Arbitration Act. Every Federal authority Appellant has found on this issue holds that defenses are not barred by the passage of three months under 9 U.S.C. §12.

The earliest authority to speak to this issue was The Hartbridge, 57 F2d 672 (2d cir. 1932); cert. denied, 288 US 601 (1932). In The Hartbridge, supra, the Plaintiff moved to confirm the Award within three months of its entry. The party seeking to vacate the Award had lost their exhibits in support of their grounds for vacating the Award and had notified the District Court of its intent to move to vacate as soon as the exhibits were found. The District Court confirmed the

Award before the expiration of three months holding that the opposing party could still move to vacate after confirmation. The opposing party appealed before the three months elapsed and the Circuit Court held that the District Court had abused its discretion in confirming the Award. However, by the time the appeal was decided, well over three months had passed since the Award was entered. The Court noted that even though three months had passed the opposing party could still defend against confirmation, referring to authority for this proposition. The Hartbridge, Supra, 57 F2d at 673. However, the Court did not "commit" itself to this authority since, under the circumstances, the period of appeal tolled the running of the three month period, thereby leaving the opposing party enough time to file a motion to vacate. The Hartbridge, Supra, 57 F2d 673-674.

Federal cases addressing this issue after The Hartbridge, Supra, relied on the reference in The Hartbridge to authority for the proposition that "even though the statutory period for moving to vacate an award has expired, a party may use the statutory grounds for vacation in defense of a motion to confirm " under the Federal Arbitration Act. See Brown v Bridgeport Rolling Mills, 245 F. Supp 41, 43, (D. Conn., 1965); Catz American Co., Inc. v Pearl Grange Fruit Exchange, Inc., 292 F. Supp. 549, 551 (S.D. NY, 1968); Fukaya Trading Co., S.A.V. Eastern Marine Corp., 322 F. Supp. 278, 280 (E.D. LA, 1971); Riko Enterprises, Inc. v Seattle Supersonics Corp., 357 F. Supp. 521, 523 (S. D. NY, 1973); Paul Allison Inc. v Minikin Storage of Omaha, Inc. 452 F. Supp 573, 575 (D. Neb. 1978). Every one of these cases cited to The Hartbridge when holding Section 12 does not preclude defenses to confirmation after the expiration of three months. The Court in the instant action held that these cases did not support Appellant's right to defend because these cases took the language from The Hartbridge "out of context". Jefferson Supra, 473 F. Supp. at 1259. Appellant suggests that rather than quoting "out of context", the Courts

in the decisions above merely "committed" themselves to the authority referred to in The Hartbridge. The fact that the court in The Hartbridge was not required to commit itself to the authority relief on in the cases above does not make the authority in the latter cases any less binding.

Although Appellant can find no cases decided in this Circuit addressing this issue directly, there is one case in this Circuit which implies that an unsuccessful party to an Arbitration Award has the option of affimatively defending against an Award or moving to vacate the Award on the same grounds.

In Tamari v Conrad, 552 F2d 778 (7th Cir., 1977), the Plaintiff, who was unhappy with the selection process of the arbitrators, sued for declaratory relief. In finding the arbitrators themselves were immune from suit, the Court noted the Plaintiff had two other optional remedies:

> "Thus, Tamari (Plaintiff) is not forclosed from challenging Defendant's authority by our decision. It has the choice of either waiting for Bache to attempt to enforce the arbitrators Award and then asserting its claim as a defense or bringing an action against Bache seeking to have the Award set aside because the panel was improperly selected." Tamari v Conrad, supra, 552 F2d at 781.

The most recent case addressing this issue, and perhaps the most well reasoned, was decided ten days before this case in the Northern District of Indiana.[3] In Chauffeurs, Teamsters, Warehousemen and Helpers Local 394 v Ruan Transport Corp., 473 F. Supp. 298 (N.D. Indiana, 1979), the Court addressed the identical issue presented in this action. The Court noted at the outset that the Federal Arbitration Act was the applicable statute in question. Ruan, Supra, 473 F Supp at 299. The Court then addressed the issue of whether the three month limitation in Section 12 precluded defenses to confirmation after the expiration of three months. Ruan,

Supra, 473 F. Supp at 300. The Court acknowledged that The Hartbridge avoided an express ruling on this issue and that the cases referring to The Hartbridge had adopted the authority referred to but avoided in The Hartbridge. Ruan, Supra, 473 F. Supp. at 300-301. However, the Court did not stop its inquiry at this point and overule forty-seven years of precedent on the grounds it was taken out of context. Instead, the Court examined the legislative history of the Act. Ruan, Supra, 473 F. Supp at 301-303. An examination of the original act passed in 1925 resulted in a finding that the original language, although ambiguous, could be construed so as to explicitly allow defenses to confirmation without regard to the time limitations in Section 12. Ruan, Supra, 473 F Supp at 302. Further examination uncovered the fact that the source of the Federal Act was the New York Arbitration Act which had been interpreted as allowing defenses to a motion to confirm which could have been raised on a motion to vacate, even though the three month limitation on a motion to vacate had expired. Ruan, Supra, 473 F. Supp at 302. The Court concluded that since Congress had not disapproved of this construction at the time of the Acts passage then it was their intent to adopt the New York Law as it had been interpreted by the New York Court and therefore Congress intended to allow defenses to confirmation to be raised three months after the limitations set forth in Section Twelve. Ruan, Supra, 473 F. Supp. at 302-303. After determining the Congressional intent, the Court held that the Defendant would be permitted to defend against confirmation on the same grounds that could have been used to vacate the Award and denied the

3. Defendant's counsel was not aware of this decision until well after this case was decided. Consequently Defendant was unable to present it to the District Court for consideration. However, Plaintiff's counsel should have been aware of this decision since they were counsel for the unsuccessful party in Ruan. However, they did not present it for consideration to the District Court.

Plaintiff's motion to strike Defendant's affirmative defenses. Ruan, Supra, 473 F. Supp. at 303.

Appellant submits that the result reached in Ruan is the most logical construction of the Federal Arbitration Act in light of the legislative history of the Act and the forty-seven years of Federal precedent supporting this construction. Therefore, it is Appellant's contention that the lower Court erred in holding that Appellant was precluded from defending against confirmation of the Joint Committee Award.

THE COMPLETE ELIMINATION OF THE RIGHT TO DEFEND AGAINST THE INVALIDITY OF AN ARBITRATION AWARD IS NOT CONSISTENT WITH FEDERAL LABOR POLICY.

The final portion of the Lower Court's opinion is devoted to the proposition that eliminating the right to defend against the invalidity of an Arbitration Award if the unsuccessful party has failed to move to vacate the Award within ninety days is consistent with Federal Labor Policy. Jefferson, supra, 473 F. Supp. at 1259. The apparent policy that this disposition favors is "speedy resolution of disputes". Jefferson, supra, 473 at 1259. It should be noted, however, that after "condemning" Appellant for failing to move to vacate the Award within ninety (90) days and "asking to be given its day in Court when Plaintiff brings suit in frustration", the Court found that the Appellant's challenge to the arbitration decision was justifiable and there was a sincere question as to the validity of the Arbitration Award. Jefferson, supra, 473 F. Supp. at 1259-1260. It should also be pointed out that one of Appellant's defenses to enforcement of the Award was that the Joint Committee acted in an arbitrary and discriminatory manner by absolutely precluding Defendant from presenting evidence at the arbitration hearing in support of the charges against the employee. Hence, the result of the District Court's decision is that not only was Appellant "condemned" for

asking for its "day in Court" but Appellant was also precluded from defending against the deprivation of its "day in Arbitration", even though this Court recognized this to be a justifiable defense to the validity of the Award.[4]

Another Federal policy, predominant in all aspects of Federal Law, is defeated as a result of the District Court's decision: the policy that the Federal Courts will not condone the deprivation of a fair hearing. This policy has been adhered to in Labor Arbitration Proceedings, Harvey Aluminum, Inc., v Steelworkers, 263 F. Supp. 488 (C.D. Cal., 1967) as well as purely commercial arbitration proceedings, Riko Enterprises, Inc., v Seattle Supersonics Corp., 357 F. Supp. 521 (S.D. NY, 1973). Indeed, this Circuit has stated that an Award issued by a biased arbitrator "will not be enforced" in a decision stating that the option to defend against such an Award is an alternative to bringing a Motion to vacate. Tamari v Conrad, supra, 552 F2d at 781.

Defendant submits this Court should find that the Federal policy in favor of "just resolution" of labor and other disputes takes precedence over "speedy resolution" of labor disputes, especially where the implementation of the "speedy resolution" policy results in the elimination of all defenses to an unjest Award in the face of forty-seven years of Federal precedent to the contrary. Where the validity of an Award is in question as a result of the deprivation of a fair hearing "no Court, State, or Federal, should affix its imprimatur to any such "Award". Riko Enterprises, Inc. v Seattle Supersonics Corp., supra, 357 F. Supp. at 526.

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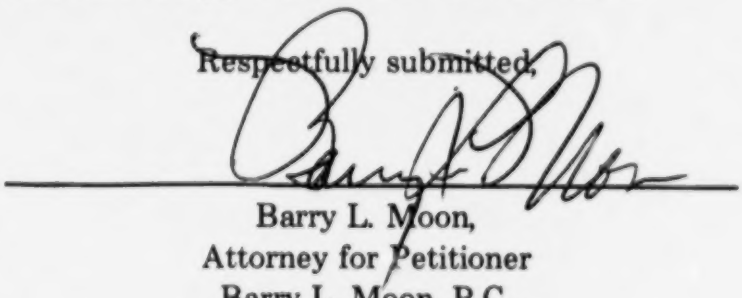
4. Two other justifiable defenses raised in Defendant's Brief in Opposition to Plaintiff's Motion to Strike were: 1) the employee's lack of medical qualifications to drive, see World Airways, Inc. v International Brotherhood of Teamsters, 578 F2d 800 (9th Cir., 1978) and 2) The Committee's addition of terms to the contract, see, Cannon v Consolidated Freightways Corp., 524 F2d 290, 295 (7th Cir., 1975).

For the reasons set forth above, this Court should find that the District Court's ruling is inconsistent with Federal policy in favor of just resolution of arbitrable disputes.

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHAUFEURS, TEAMSTERS, WAREHOUSEMEN)
AND HELPERS LOCAL UNION NO. 135
)

v.
)

JEFFERSON TRUCKING COMPANY, INC.

JUDGMENT

Pursuant to the Court's order of this date granting plaintiff's motion to strike affirmative defenses, grant-ing plaintiff's motion for summary judgment, and denying defendant's motion for leave to file motion to vacate the grievance award, which order shall serve as findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff is entitled to judgment as a matter of law, it being established that there is no genuine issue of material fact, each party to pay its own costs and counsel fees.

Dated this 27th day of July, 1979.

/s/William E. Stickler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN)
AND HELPERS LOCAL UNION NO. 135

v.)IP 78-216-C

JEFFERSON TRUCKING COMPANY, INC.)

ORDER

This matter is before the Court on motions by plaintiff to strike affirmative defenses and for summary judg-ment and motion by defendant for leave to file motion to vacate an arbitra-tion award. Plaintiff's complaint requests enforcement of an arbitration award rendered in favor of a union member who is an employee of defendant, which award has not bee complied with by defendant. Jurisdiction over the claim is predicated upon 29 U.S.C. § 185.

As established by the complaint and other materials before the Court, the complaint is based upon the following facts. Plaintiff Teamsters Local 135 and defendant Jefferson Trucking Company were parties to a collective bargaining agreement which was in effect at the times material to the action. On October 19, 1977, Paul Nettleton, an employee of defendant represented by plaintiff, was discharged by defendant after being involved in an accident the previous day while driving equipment on the job. The written notice of discharge stated that "the accident is a major chargeable accident due to ecessive speed for conditions." Thereafter, a grievance was filed by Nettleton and processed according to the agreement. Eventually, the Grievance Committee, whose awards are to be final and binding under the terms of the contract (Art. X § 4(d)), ordered Nettleton's reinstatement with back pay stating:

> "It is the majority decision of this Committee based on the facts and evidence presented such as the company failed to site (sic) the specific Con-

> tract Article or rule violation as well as offense, the employee is to be reinstated with full seniority and paid for all time lost."

The reinstatement was ordered on November 17, 1977. Though plaintiff repeatedly demanded that defendant abide by the award, defendant has refused, bringing about the institution of this lawsuit for enforcement of the award. In addition, plaintiff alleges that defendant's conduct has been such that defendant should be required to pay plaintiff s reasonable attorney fees and costs for prosecuting the action.

Defendant has answered raising several affirmative defenses. These include contentions that the Grievance Committee award went outside the scope of the collective bargaining agreement, that the award was not final and therefore not reviewable, that plaintiff is guilty of unclean hands, that plaintiff is unentitled to relief because of the "arbitrary and discriminatory nature of the decision (of the Grievance Committee) in light of past practicies of the Joint Committee . . .,"that the sought-after relief is not available at law and is barred by laches, and that defendant has been denied medical information needed to determine if Mr. Nettleton is fit to drive in accordance with ICC regulations.

In moving to strike defendant's affirmative defenses and for summary judgment, plaintiff advances several contentions. However, the crucial question before the Court is whether defendant, the unsuccessful party at arbitration, who did not move to vacate the disfavorableaward within ninety days as required under Indiana law or within three months as required by federal statute, may now raise contentions, which he could have raised as grounds to vacate in such motion, as affirmative defenses in the instant suit to enforce the award, which suit was filed after the three month and ninety-day periods but within the time limits set for filing a suit to enforce or confirm an award.

Plaintiff argues basically that the raising of these defenses, no matter how meritorious, is barred by the short statute of federal labor policy encourages the use of n award. Plaintiff contends that

federal labor policy encourages the use of the arbitration and award procedure to provide speedy final resolutions to labor problems and that a short statute of limitations for moving to vacate awards serves this federal policy. Plaintiff further contends that the speed and finality policies would be frustrated considerably if the loser in arbitration could refuse to comply with the award, sit back idly until the statute of limitations ran on bringing a motion to vacate, and then raise all his defenses anyway if a suit to enforce the award were filed by the other party.

In opposition, defendant advances the argument that since plaintiff contends that the statute of limitations contained in the Indiana Arbitration Act is applicable rather than that contained in the Federal Arbitration Act, an Indiana provision "tolling" the statute of limitations must also be applied. Defendant draws the tolling provision it contends should apply from Indiana Trial Rule 13(J)(1), which defendant maintains allows a defendant to avail himself of a setoff or counterclaim by way of defense even though a claim would otherwise be barred.

Where a federal statute such as 29 U.S.C. §185 contains no statute of limitations, the federal court shall, as a matter of federal law, select the state statute of limitations most appropriate to the type of action. UAW v. Hoosier Cardinal Corp., 386 U.S. 696, 704-5 (1966); Canada v. United Parcel Service, Inc., 446 F. Supp. 1048 (N.D. Ill. 1978). Since the present complaint seeks enforcement of an arbitration award, the most appropriate Indiana statute would seem to be contained in sections of the Indiana Code concerning arbitration. I.C. 34-4-2-13 states:

> "(a) Upon application of a party, the court shall vacate an award where: (1) the award was procured by fraud..., (2) there was evident partiality by an arbitrator...or corruption..., (3) the arbitrators (exceeded) their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted... (b) An application under this section shall be made within ninety (90) days after the mailing of a copy of the award to the applicant, except that, if predicated upon corruption or fraud or other undue means, it

shall be made within ninety (90) days after such grounds are known or should have been known . . .(d) If the application to vacate is denied, and no motion to modify or correct the award is pending (which motion must also be made within ninety days of the mailing of the award) the court shall confirm the award."

I.C. 34-4-2-12 states:

"Upon application of a party, but not before ninety (90) days after the mailing of a copy of the award to the parties, the court shall confirm an award, unless within the time limit hereinafter imposed (in 34-4-2-13 quoted above) grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 13 and 14 (34-4-2-13, 34-4-2-14) of this act. Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in said court."

Though the language of the Indiana statute seems to quite clearly state the grounds such as those defendant urges as defenses must be raised within ninety days in a motion to vacate and the court "shall confirm" if they are not, defendant argues that cases under 9 U.S.C. § 9 et seq., and cases from other jurisdictions under arbitration statutes similar to the one in Indiana do not support that interpretation of the Indiana statute. In addition, defendant argues that even if the above interpretation of the statute is correct, since under Hoosier Cardinal the federal court must appy the most appropriate state statute of limitations due to the absence of a stated statute of limitations in the federal statute, the court must also apply state provisions which would toll the Indiana statutes of limitation, citing Johnson v. REA, 421 U.S. 454 (1975). In this case defendant urges the court to apply as a tolling provision Indiana Trial Rule 13 (J)(1) which reads:

"The statute of limitations, a non claim statute, or other discharge at law shall not bar a claim as-

serted as a counterclaim to the extent that:

(1)it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, or it could have been asserted as a counterclaim to the opposing party's claim before it (the counterclaim) was barred."

Indiana Trial Rule 13(J)(1)will not save defendant from the operation of the limitations periods in I.C. 34-4-2-13(b) and (d) and I.C. 34-4-2-12 for several reasons. First, it cannot be saie that this rule is a tolling provision in the usual sense of the word, that is, Trial Rule 13(J)(1) does not interrupt the running of the limitations period. It was this latter type of tolling provision which was referred to in Johnson v. REA when the court stated that "any period of limitation. . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action.... In borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto. . . ." Id., 421 U.S. at 4534.

Rather than being a tolling provision which Johnson indicates should be adopted under certain circumstances with the state statute of limitations, Indiana Trial Rule 13(J)(1) is really an Indiana procedural rule, which is obvious from the fact it is contained in the Indiana Trial Rules. It is elementary that federal procedure controls in federal courts.

Some federal cases indicate that a counterclaim arising out of the transaction or occurrence on which the action is founded may be asserted despite the bar of a statute of limitations if it is asserted for purposes of recoupment. However, such a counterclaim is not permitted if it is a claim for affirmative relief. See, e.g., Nalley v. McClements, 295 F. Supp. 1357 (D. Del. 1969). In the instant case, although defendant does not style his answer as a counterclaim, he is attempting to raise as defenses items which really constitute a request for affirmative relief,

namely, vacation of an arbitration award. Therefore, even though Indiana Trial Rule 13(J)(1) seems to have a counterpart in federal decisional law, this does not aid defendant.

Even if defendant were correct in stating that Johnson mandates the use of the Indiana Trial Rule as a tolling provision, Johnson further states that "considerations of state law may be displaced where their applicability would be inconsistent with the federal policy underlying the case of action under consideration. Id., 421 U.S. at 465.

There is considerable indication that federal policy favors the use of bargained-for arbitration to settle labor disputes and favors court intervention only under very limited situations. Under the teachings of the famous Steelworkers Trilogy, a federal court, at the pre-arbitration stage, may not do more than pass on the issue of arbitrability, Steelworkers v. Amer. Mfg. Co., 363 U.S. 564 (1959), resolving all doubts in favor of arbitrabiity, Steelworkers v. Warrior and Gulf Co., 363 U.S. 574 (1959). Post arbitration review is limited to a determination of whether the arbitrator's award is susceptible of the interpretation that it had its basis in the contract. Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1959).

Thus, it is an understatement to say that arbitration is a favored method of resolving labor disputes. Another indication of the federal proarbitration policy is the application by the courts of the short periods allowed in the federal and state arbitration acts for moving the courts to vacate an award. The reason for these short periods for motions to vacate is to accord the arbitration award finality so that the parties who contracted for the use of arbitration get the benefit of what they bargained for --speedy resolution of disputes so that their business may go forward. See, e.g., Hill v. Aro Corp., 275 F. Supp. 482, 487 (N.D. Ohio 1967); Emporium Area J.S.A. v. Anundson Constr. & Bldg. Supply Corp., 402 Pa. 82, 166 A.2d 269 (1961).

This policy would seem to condemn what defendant has done here, namely, ignore an award disfavorable to him, fail to abide by

it and fail to move to vacate it and then ask to be given his day in court when plaintiff brings suit in frustreation to have the arbitration award enforced. If defendant's defenses were of vital importance to him, he had an opportunity to raise them. Since he failed to do so earlier, the language of the Indiana statute clearly requires the court to grant confirmance of the award. Though many cases were cited by both sides involving the timeliness of motions to vacate, the logic of which would apply in this case, fewer cases are on all fours factually with this case. Two cases which do squarely address the point raised here concluded that a defendant may not assert, after the statute of limitations had run on a motion to vacate, grounds which could have been raised in such a motion as defenses to a suit for enforcement. Component Systems, Inc. v. Murray Enterprises, 217 N.W. 2d, 514, 516 (S. Ct. Minn. 1974); Textile Workers Union v. Uncas Printing and Finish. Co., 125 A.2d 236, 239-40 (Super. Ct. Conn. 1956).

Defendant cites several cases to support the position that hemay now raise as defenses contentions concerning the arbitrator's authority which could have been raised on a motion to vacate. Most of the cases defendant cites which appear to support his position rely on language from the case of The Hartbridge, 57 F.2d 672 (2d Cir.), cert. denied, 288 U.S. 601 (1932). The language quoted from this case by defendant and by the courts in cases which rely on Hartbridge is taken out of context and cannot be used to support defendant's position. A careful reading of the facts in Hartbridge shows that a motion to confirm the arbitration award was made within one month of the award. In that context, the court indicated that a motion to vacate could still be timely filed within the three-month period, even though filed after the motion to confirm. The case which defendant seems to rely most heavily on, Riko Enterprises v. Seattle Supersonics Corp., 357 F. Supp. 521 (S.D.N.Y. 1973), did indeed allow the consideration of a motion to vacate after the three-month period had run when the opponent filed a suit to confirm the award, but the Riko court relied on the language taken out of context from Hartbridge.

Thus, it seems consistent with federal labor policy concerning arbitration awards and with cases applying the short statutes of limitations contained in most arbitration statutes to find that defendant is time-barred from raising his defenses at this point. In addition, for the same policy reasons, the Indiana Arbitration Act clearly indicates the court must confirm the award. Thus defendant's defenses will be stricken and plaintiff's motion for summary judgment granted since no issues remain. It is also clear that defendant's motion for leave to file a motion to vacate must be denied due to the late date of its filing.

One final matter remains to be considered concerning the rendering of summary judgment. Plaintiff requests an award of costs and attorney fees. When a challenge to an arbitration decision is "without justification", costs and attorney fees are awardable but if there is a sincere question as to the validity of the arbitration award, an award of such items is inappropriate. Intern. Ass'n of Machinists v. Texas Steel Co., 538 F.2d 1116 (5th Cir. 1976). Since defendant did here have case law to support his position, the Court finds that the challenge was sincere and therefore, no award of costs and fees will be made.

irBy reason of the foregoing, the Court concludes: (1) that plaintiff's motion to strike defendant's affirmative defenses is GRANTED:

(2) that plaintiff's motion for summary judgment in favor of plaintiff based on the absence of factual questions is GRANTED:

(3) that defendant's motion for leave to file motion to vacate the Joint Committee Award is DENIED.

IT IS SO ORDERED.

Dated this 27th day of July, 1979.

s/s William E. Stickler
United States District Judge

In The
United States Court of Appeals
For the Seventh Circuit

No. 79-2017

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 135,

Plaintiff-Appellee

v.

JEFFERSON TRUCKING COMPANY, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 78-216-CWilliam E. Steckler, Judge.

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submitted*FEBRUARY 26, 1980DECIDED AUGUST 28, 1980

Before CUMMINGS, PELL and BAUER, Circuit Judges.

BAUER, Circuit Judge. Defendantappellant Jefferson Trucking Company appeals from the order of the district court
granting summary judgment in favor of plaintiffappellee, Teamsters Union Local 135, on the plaintiff's complaint to enforce an arbitration award conferred under the collective bargaining agreement between the parties. We affirm.

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* This appeal has been submitted for decision solely on the basdis of the record and the briefs filed on behalf of the parties. See circuit Rule 14.

I.

The facts material to the disposition of this appeal are not in dispute. On October 18, 1977, the defendant was notified that one of its drivers, Paul Nettleton, had been involved in a serious traffic accident with a company vehicle during the course of his employment. The following day the defendant gave Nettleton and the Plaintiff written notice, pursuant to Article XI of the collective bargaining agreement, that Nettleton was discharged on the ground that he was responsible for the accident due to "excessive speed for conditions." Nettleton subsequently filed a grievance under the provisions of Article X of the collective bargaining agreement. The grievance was not resolved by resort to the preliminary procedures set forth in the agreement, and the matter was ultimately submitted to the Joint Grievance Committee for resolution. On November 17, 1977, the Joint Committee ordered Nettleton reinstated to employment with full seniority and payment of lost wages.

Notwithstanding repeated demands by the plaintiff, defendant refused to abide by the award and on April 6, 1978, the plaintiff filed a complaint in the district court to enforce the arbitration award. Subject matter jurisdiction was predicated on Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

Defendant responded to the complaint with an answer denying the plaintiff's allegations and further alleging eight affirmative defenses to enforcement of the award. On May 26, 1978, plaintiff filed a motion to strike defendant's affirmative defenses and for summary judgment on the ground that defendant's failure to move to vacate, modify, or correct the award within ninety days of its entry as required under both federal and state law, precluded the defendant from attacking the validity of the award. Defendant filed a brief in opposition to these motions and, in addition, filed a motion seeking leave to move to vacate the award of the Joint Grievance Committee.

The district court held that the defendant was barred under the applicable statute of limitations from challenging the propriety of the arbitration award and accordingly denied the defendant's motion for leave to move to vacate the award and granted the plaintiff's motion to strike the defendant's affirmative defenses and for summary judgment. Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Company, Inc. 473 F. Supp. 1255 (S.D. Ind. 1979). Defendant has appealed from that adverse judgment to this Court.

II

The sole issue on appeal is whether the defendant, as the unsuccessful party at arbitration and who did not move to vacate the disfavorable award within the time period prescribed for such motions, may subsequently raise contentions, which it could have raised as grounds to vacate in such a motion, as affirmative defenses in a suit to enforce the award, which suit was filed after the prescribed period for a motion to vacate but within the time limits set for filing a suit to enforce the award. We hold that the defendant's failure to move to vacate the arbitration award within the prescribed time period for such a motion precludes it from seeking affirmative relief in a subsequent action to enforce the award.

As a preliminary matter, we address the defendant's contention that the United States Arbitration Act of 1925 (USAA), 9 U.S.C. § 1 et seq., rather than the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.A. § 141 et seq., governs this action. In support of this contention, plaintiff argues that in actions to confirm arbitration awards under the relevant provision sof the USAA, federal courts have permitted a delinquent motion to vacate the award. See, e.g., Riko Enterprises, Inc. v. Seattle Supersonics Corpo., 357 F. Supp. 521 (S.D.N.Y. 1973); Paul Allison, Inc. v. Minikin Storage of Omaha, 452 F. Supp. 573 (D. Neb. 1978). We find plaintiff's reliance on the USAA in the context of this case to be misplaced.

This action was brougfht under Section 301 of the LMRA, which provides that suits for a violation of the collective bargaining agreement between an employer and union may be instituted in any United States District Court having jurisdiction of the parties. 29 U.S.C. § 185(a). Since the decision of the Supreme Court in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), it is settled that in the field of labor arbitration the governing law is a body of federal law to be fashioned by the federal courts under Section 301(a) of the LMRA. Id. at 456-457. Indeed, in Lincoln Mills and its progeny the expansive role of the LMRA and the substantive law to be fashioned under it became manifest. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), is the most directly pertinent, for in that case it was held that the federal courts have the pwer under Section 301(a) of the LMRA to compel specific performance of labor arbitration awards without reviewing the merits of such awards. These cases demonstrate that Section 301 confers the jurisdictional basis and corresponding source of law governing this action.

We do not, of course, suggest that the LMRA is the exclusive choice of law in this field. But assuming arguendo that subject matter jurisdiction was properly predicated on the USAA, we find the provisions of that statute raise insurmountable obstacles to its applicability in this case. In the first instance, the defendant is facted with the statutory exclusion of Section 1 of the USAA, which provides that the Act is not applicable to "contracts of employemtn of...(any) class of workers engaged in foreign or interstate commerce." 9 U.S.A. § 1. As defendant readily concedes, there is a division among the circuit courts of appeals which have considered this question, not only whether collective bargaining agreements in general are excluded, but whether collective bargaining agreements for specific industries are excluded.

We find it unnecessary to decide these questions for, even assuming that the collective bargaining agreement in this case

is not excluded from the coverage of the Act under Section 1, Section 9 of the Act would appear to bar defendant's claim that the USAA governs. Section 9 provides, in relevant part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9. Since no provision of the collective bargaining agreement in the instant case permits deference to federal court as contemplated by Section 9, it would appear that defendant's reliance thereon is unavailing. Moreover, Section 12 of the Act provides that notice of a motion to vacate an award under Section 10, or to modify or correct the award under Section 11, must be served "within three months after the award is filed or delivered." 9 U.S.C. § 12. Thus, Section 9 instructs that the court "must grant" an application for confirmation unless the award is challenged within a three month period following its issuance. In this case, the defendant attacked the validity of the award nearly six months after its issuance. Accordingly, the plain meaning of Section 9 of the statute would seem to bar the defendant from raising a delinquent motion to vacate the award.

Nor do we find the cases cited by the defendant permitting a delinquent motion under Section 9 of the USAA to be persuasive. E.g., Riko Enterprises, supra. These cases rely on misreading of The Hartbridge, 57 F 2d 672 (2d Cir.), cert. denied, 288 U.S. 601 (1932). We agree with the analysis of the district court in the instant case that:

> A careful reading of the facts in Hartbridge shows that a motion to confirm the arbitration

> award was made within one month of the award. In that context, the court indicated that a motion to vacate could still be timely filed within the three-month period, even though filed after the motion to confirm.

III

We therefore conclude that subject matter jurisdiction in this case was proper under Section 301 of the LMRA. The LMRA, however, does not provide for a time limitation on actions to vacate an arbitration award in a suit to enforce the award under Section 301. Accordingly, the timeliness of a Section 301 suit is to be determined, as a matter of federal law, "by reference to the appropriate state statute of limitations." UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966). In this case, the district court correctly deferred to the Uniform Arbitration Act, adopted in Indiana, as the appropriate state statutes of limitations. Section 34-4-2-12 of the Indiana Code provides:

> Confirmation of an award. - Upon application of a party, but not before ninety (90) days after the mailing of a copy of the award to the parties, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 13 and 14 (34-4-2-13, 34-4-2-14) of this act. Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in said court.

IND. CODE § 34-4-2-12 (emphasis supplied). Section 34-4-2-13 prescribes a ninety day time limit for the filing of a motion to vacate, and the same time limit is imposed by Section 34-4-

2-14 on the motion to modify or correct an arbitration award. Since the defendant failed to file such a motion within the time period prescribed by the statutes, we hold the defendant is therefore barred from prosecuting its claim to invalidate the award. Other federal courts which have considered this question, in suits brought either under the LMRA or USAA, have so held. See e.g., Communications Workers of America v. Pacific Tel. & Tel. Co., 462 F. Supp. 736 (C.D. Cal. 1978); Pizzuto v. Hall's Motor Transit Co., 409 F. Supp. 427 (E.D. Va. 1976); International Union, United Auto, Aerospace & Agr. Implement Workers of America (UAW) v. LaCrosse Cooler Co., 406 F. Supp. 1213 (W.D. Wis. 1976); DeLorto v. United Parcel Service, Inc. 401 F. Supp. 408 (D. Mass. 1975).

The conclusion that the defendant is barred by the statute of limitations from now seeking to invalidate the award finds additional support in the federal policy favoring voluntary arbitration as the most expedient method of resolving labor disputes. See e.g., United Steel workers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). Thus, the purpose of the short periods prescribed in the federal and state arbitration statutes for moving courts to vacate an award is to accord the arbitration award finality in a timely fashion. As the district court observed, this policy would seem to condemn the conduct of the defendant who ignored an award disfavorable to it, failed to move to vacate the award, and then sought to be given its day in court when the plaintiff brought suit in frustration to have the arbitration award enforced. If the defendant's defenses were of such vital importance to it, the defendant nevertheless had an opportunity to raise them in the manner contemplated by statute.

IV

Finally, defendant argues that the inovation of the statute of limitations operates to preclude it from defending against the action to enforce the award, in derogation of the common law rule that statutes of limitation do not run against pure

defenses. However, this argument ignores the fact that an action to enforce an arbitration award is a creature of statute and was unknown at common law. See, e.g., Lincoln Mills, supra, 353 U.S. at 466 (Frankfurter, J., dissenting). It is settled that where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time period within which the right may be enforced, the time so fixed becomes a limitation on such right. See generally 53 C.J.S. § 102.

Moreover, the common law rule applies to pure defenses, such as recoupment, and not to setoffs, counterclaims or crossclaims, all of which are regarded as affirmative actions. In this case, the statute compelled the defendant to obtain the affirmative relief of vacation of the award in order to avoid confirmation. The defendant apparently recognized this obliga-tion when it belatedly sought to move to vacate the award. Indeed, the affirmative defenses alleged in the defendant's answer to the complaint are essentially reiterated in its motion to invalidate the award. Alhough the answer is not framed as a counterclaim, the "defenses" raised therein constitute a request for affirmative relief, namely, vacation of the arbitration award. A counterclaim for affirmative relief may not be asserted if barred by the statute of limitations. See, e.g., Nalley v. McClements, 295 F. Supp. 1357 (D. Del. 1969).

V.

We have examined the defendant's other arguments and find them to be qually without merit. For the foregoing reasons the judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Ceriorari be issued to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 28, 1980.

Decisions Below

The official citation of the decisions below are 473 F. Supp. 1255 (S.D. Ind. 1979) 628 F.2d 1023 (7th Cir. 1980) presented in the appendix.

Jurisdiction

The date of order from which relief is sought is August 28, 1980. No rehearings were sought. No extensions have been prayed for at anytime.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. 1254. The Courts below were presented the case on the jurisdictional basis of 28 U.S.C. §1337, based upon an action to enforce a labor contract under the Labor-Management Relations Act, 29 U.S.C. §185

9 U.S.C. §1

§1. "Maritime transactions"and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch 392, §1, 61 Stat. 670.)

Indiana Trial Rule 13

Counterclaim and Cross-Claim

(A) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third-parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

29 U.S.C. §185

Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Indiana Arbitration Act

34-4-1-1 [3-201]. Who may arbitrate — Method of submission — All persons, except infants and insane persons, may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them which might be the subject of a suit at law, except as otherwise provided in the next section, and may agree that such submission be made by a rule of any court of record designated in such instrument. [2 R.S. 1852, ch. 3, §1, p. 227; Acts 1939, ch. 22, §1, p. 42.]